JUN 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 77-1701

JIM ROSE, WARDEN

PETITIONER

VS.

JAMES E. MITCHELL and

JAMES NICHOLS, JR.

RESPONDENTS

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NO. 77-1701

JIM ROSE, WARDEN, Petitioner,

v.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions below are correctly set out in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions set out in the Petition, the following provisions should be added.

Article One, Section Fourteen of the Constitution of the State of Tennessee is as follows:

Section 14 prerequisites to criminal charge--that no person shall be put to answer any criminal charge but by presentment, indictment or impeachment.

QUESTIONS PRESENTED

1. Whether the indictment and subsequent conviction of the respondents can stand when the method of selection of the grand jury foreman violates the Fourteenth Amendment.

2. Whether this Court's decision in Stone v. Powell, 428 U.S. 465 (1976) applies to non-Fourteenth Amendment claims so as to preclude federal habeas corpus relief in a case involving discrimination in the selection of a grand jury foreman.

3. Whether there sufficient reasons under the authorities of this Court to warrant the granting of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The respondents, both black men, were indicted on November 6, 1972, for two counts of first degree murder by the Tipton County, Tennessee, grand jury. On March 22, 1973, the petitioners were found guilty after a jury trial of the murders and given two (2) sixty (60) year sentences to run consecutively. Prior to the trial, the respondents filed a written pro se pre-trial motion in the nature of a plea in abatement in which they asked the court to dismiss the indictment for, in part, "systematic exclusion of Negroes...in regards to the position of the foreman of said grand jury." (R, State Trial, Vol. II, page 21).

Evidence adduced from the witnesses at the state court hearing on the plea in abatement established that three prior foremen of the grand jury could not remember there ever being a black grand jury foreman. (R, State Trial, Vol. I, 72, 75, and 81-82). The state produced no witnesses or evidence in the state court showing why there had never been a black grand jury foreman. One of the foremen testifying was the foreman of the Grand Jury indicting the respondents. He testified that he had been foreman of various grand juries in Tipton County since the early 1950's and that he had been asked to serve by the criminal court judge again as foreman of the grand jury for the November, 1972 Term because the regular foreman could not serve. (R, State Trial, Vol. I, 74-77). In Tennessee the criminal court judge appoints the foreman of the grand jury. T.C.A. 40-1506.

After hearing the evidence on the selection of the foreman of the grand jury and other matters, the state trial judge stated his ruling: "Plea in abatement will be denied." (R, State Trial, Vol. I, 96). The state trial judge made no written or oral findings of facts or law. The sum total of his rulings from the bench was that the plea was denied. The state judge's written order denying the plea in abatement reads in full: "Plea in abatement is overruled." (R, State Trial, Vol. II, 42).

After exhausting state remedies, the respondents filed a petition for writ of habeas corpus in the District Court of the Western District of Tennessee. During the course of those proceedings, the District Court asked for and received an affidavit from the grand jury foreman on April 14, 1976, which stated that the foreman did not vote

on the indictment of the respondents. On April 14, 1976, the petitioners also filed with the District Court an affidavit of the state trial judge. The state judge indicated that the foreman of the Tipton County November, 1972 Grand Jury, Mr. Peyton Smith, was personally selected by the trial judge as foreman when the regular foreman became ill. Mr. Smith was not a member of the regular jury panel or venire. As to racial discrimination, the trial judge stated:

> In my five counties, I do not have a black grand jury foreman, although I have a black member of my Jury Commission in one county. Most all of my Grand Juries and Petit juries have sizeable numbers of blacks on them, both men and women. I don't appoint Grand Jury Foreman very often because when their two year term expires, I usually reappoint them, thus they serve a long time and the problem doesn't come up very often. I don't think that I have really given any thought to appointing a black foreman but I have no feeling against doing so. (Emphasis added).

(R, Affidavit filed in District Court on April 14, 1976).[1]

ARGUMENT

The issue in this case involves the constitutionality of the process by which the foreman of

[1] During the habeas corpus proceeding in the District Court and on appeal to the United States Court of Appeals for the Sixth Circuit, there was an issue of whether or not constitutional standards had been violated in the selection of the grand jury itself. The Court of Appeals, because of its decision as to the foreman, found it unnecessary to reach this issue, but indicated that if it did, the case would probably have to be remanded for a further evidentiary hearing in this District Court. Mitchell v. Rose, 570 F.2d 129, 132-134 (6th Cir. 1978).

the Tipton County Grand Jury was selected. It is the simple position of the respondents, as it was the position of the United States Court of Appeals for the Sixth Circuit, that the respondents made a prima facie case of discrimination in the selection of the foreman, and the petitioners were not able to rebut that prima facie case. Therefore, the respondents were granted relief.

The petitioner makes much of its contention that the respondents were guilty of a violent crime and it couches much of its argument in emotional terms, interwoven with the facts of the crime. The facts of the crime are not relevant. Whether the crime be drunk driving or murder, this Court has continually held that discriminatory selection of grand juries [and one would assume discriminatory selection of the foreman of the grand jury] will not be tolerated. Such illegal action on the part of state officials will result in the voiding of the indictment and the granting of a new trial. The facts which are relevant to this case are those facts surrounding the selection of the grand jury foreman and the focus of this case should remain on those facts. The decision in the Court of Appeals was mandated because there had never been a black grand jury foreman within the memory of persons who testified in the state proceeding and the petitioner's attempt to rebut the prima facie case produced nothing except the affidavit of the appoining authority that he did not have anything against appointing a black, but he had just never thought of it. The case for relief is clear when the facts are judged against the prior decisions of this Court.

The petitioner has not shown this Court any

direct conflict with prior decisions of this Court or any conflict on the points of law involved in this case between the Courts of Appeals or other lower courts. The impact of the decision below will be limited; it will not bring about voiding of other indictments of those convicted in Tipton County, Tennessee, unless the unconstitutional practices continue prospectively.

I.

THE INDICTMENT AND SUBSEQUENT CONVICTION OF THE RESPONDENTS CANNOT STAND WHEN THE METHOD OF SELECTION OF THE GRAND JURY FOREMAN VIOLATES THE FOURTEENTH AMENDMENT.

A. THE FOREMAN OF THE GRAND JURY THAT INDICTED THE RESPONDENTS WAS SELECTED IN A MANNER VIOLATIVE OF THE FOURTEENTH AMENDMENT.

The position of foreman of a Tennessee grand jury is one of great importance in the Tennessee grand jury system.[2] In Hale v. Henderson, 485 F.2d 266 (6th Cir. 1973) the United States Court of Appeals for the Sixth Circuit stated that:

> "Petitioner also points out that the grand jury foreman has important statutory duties in Tennessee, T.C.A. 40-1510, 40-1622 (1955), and exercises a leadership role, as well as casting a vote in the grand jury." Id. at 270.

The grand jury foreman in Tennessee, (under the provisions of T.C.A. 40-1506), "sits as the thirteenth member of the grand jury." Since T.C.A. 40-1706 provides

[2]The grand jury indictment or presentment in Tennessee is a constitutional requirement. Article One, Section Fourteen, Constitution of Tennessee.

that "at least twelve grand jurors" must concur before an indictment can be returned, the foreman's vote can be the twelfth in returning the indictment. More importantly, even though the foreman may not always vote, he must sign the indictment. T.C.A. 40-1706. The indictment is void if not signed by the foreman. Bird v. State, 103 Tenn. 343, 52 S.W. 1076 (1899). In Tennessee there must always be a foreman in the finding of an indictment. State v. Collins, 65 Tenn. 151, 153 (1875). See 9 Michie's Digest of Tennessee Reports, Indictments, Information, and Presentments §22 (1937). While the petitioner may argue that the foreman in this case did not vote, the fact remains that the indictment is not valid under Tennessee law unless the foreman concurs with the vote and signed the indictment.

The grand jurors themselves are selected by random draw from the entire preselected jury panel. T.C.A. 40-1501. The jury panel (the jury pool) itself is chosen by the jury commissioners every two (2) years. See T.C.A. 22-221 et. seq. The grand jury foreman is chosen in a completely different manner. In essence the grand jury foreman is hand-picked by the criminal court judge. T.C.A. 40-1506. Also, as in this case, the grand jury foreman need not be a member of the jury panel or of the grand jury. T.C.A. 40-1507.

Tennessee Code Annotated §40-1510 sets out the statutory duties of the grand jury foreman. He must assist the District Attorney in ferreting out crime. Out of term he must advise the District Attorney with respect to law violations and provide him with names of witnesses which may be summoned before the next term of the grand jury. In

term the foreman may order the issuance of subpoenas for witnesses to go before the grand jury, unless directed otherwise by the District Attorney. Thus, it can readily be seen that the foreman in Tennessee has important statutory duties as to the day-to-day operation of the grand jury as well as to the validity of the indictments returned.

When the three prior grand jury foreman testified in the state court proceeding, they acknowledged that there had not been a black grand jury foreman in memory. The state produced no evidence to remove the taint of discrimination from the repondents' prima facie case. The state did, however, file the affidavit of the state trial judge who had presided over the case and who had selected the grand jury foreman.

The presiding trial judge stated as follows in his affidavit filed in the District Court: "I don't think that I have really given any thought to appointing a black foreman but I have no feeling against doing so." (Emphasis added). (R, Affidavit filed April 14, 1976, in District Court). This statement shows a negligent and callous exclusion of blacks by the person designated by statute to appoint the grand jury foreman. It is obvious that if the trial judge has never even "thought" of appointing a black forman then blacks have been excluded peremptorily by having never been considered for the position.

There is no doubt that the selection of the grand jury foreman just like the selection of the members of the grand jury is subject to the requirements of the Fourteenth Amendment. If a person is indicted by the grand jury, then, of course, blacks cannot be systematically excluded in the selection process by which the foreman is selected.

As was stated by the District Court for the Western District of Tennessee:

> If the [state] Court means to say that, if the twelve members of the grand jury other than the foreman were selected without systematic exclusion of Negroes, it would be constitutionally immaterial if Negroes were systematically excluded from the position of foreman, we cannot agree. We cannot agree because Whitus v. Georgia, supra [385 U.S. 545 (1967)] does not indicate that a grand jury that is twelve-thirteenths constitutional can render constitutionally valid indictments (Emphasis added).

Hale v. Henderson, 336 F.Supp. 512, 516 (W.D. Tenn.) (Bailey Brown, Chief Judge).

Hale v. Henderson involved a challenge to the selection process of the grand jury foreman in that it was alleged that racial discrimination was present in the selection process. When the Hale case finally came to be heard on the question of the selective discrimination of the selection of the grand jury foreman, Judge Mac Swinford, was sitting by special designation in the Western District of Tennessee. Judge Swinford indicated that if the petitioner therein had shown that the grand jury foreman had been chosen from outside the body of the grand jury venire, his claim would have been "well taken" as there had been a long history of complete exclusion of blacks from the position of grand jury foremen. In the case then before the Court, the foreman was a foreman pro tempore who had been chosen from among the members of that grand jury. The petitioners had not challenged the legality of the selection of the grand jury venire or of the grand jury itself, so the Court said that it must reach the conclusion "that the venire was selected in a manner that did not

systematically exclude blacks." (Emphasis added). Hale v. Henderson, 349 F.Supp. 567, 568 (1972), affd 485 F.2d 266 (6th Cir. 1973). Simply stated, Judge Swinford would have granted relief if the grand jury foreman in that case had been chosen from a source other than the grand jury. In this case, under facts almost identical to Hale v. Henderson, the grand jury foreman was chosen from a source other than the grand jury. Therefore, the opinion of Judge Swinford is on all fours with that of respondents in this case.

A showing that the percentage of blacks selected as foremen over a period of time (in this case 0% for as long as people could remember) varied significantly with the percentage of blacks in the population (32.4% according to 1972 statistical abstract) and that the selection process is amenable to discriminatory action is thus sufficient to warrant a prima facie finding of discrimination. Castaneda v. Partida, 430 U.S. 482, 494-495, 97 S.Ct. 1272, 1280 (1977); Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221 (1972).[3] In Alexander this Court in a unanimous opinion held that where there was proof of opportunity for discrimination coupled with a disproportionately low number of Negroes throughout the selection process, discrimination is in fact proved.

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[3]On the entire subject of discrimination in the selection of grand juries and this Court's prior decisions, see Note, GRAND JURIES-GROUP DISCRIMINATION, 33 L.E.2d 783 (1973). A Tennessee case which reversed a conviction and voided the indictment for discrimination in the selection of a grand jury is Bonds v. State, 220 Tenn. 555, 421 S.W.2d 87 (1966).

The burden of proof necessary to overcome a prima facie case cannot be met by the self-serving testimony of the person who selects the venire that he did not intend to discriminate. Castaneda v. Partida, supra at 499 n. 19. It also cannot be overcome by the statement of the trial judge that he had "no feeling against" appointing a black foreman. Alexander v. Louisiana, supra at 632; Turner v. Fouche, 396 U.S. 346, 361 (1970). The petitioner in this case has failed to overcome the respondents' prima facie case of discrimination in the selection of the grand jury foreman. Thus, the decision of the Court of Appeals should therefore stand.[4]

B. THE UNCONSTITUTIONAL SELECTION OF THE GRAND JURY FOREMAN NECESSITATES THE RELIEF GRANTED BY THE COURT OF APPEALS.

Normally, if the state fails to successfully rebut a prima facie case of discrimination, a writ of habeas corpus must issue since the indictment and all proceedings on that indictment are void. See Castaneda v.

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[4]The petitioners contend that the Court of Appeals somehow violated the clearly erroneous rule by reversing the District Court. It should be remembered that the District Court did not conduct an evidentiary hearing but based its findings on the state court transcript and certain affidavits filed in the District Court. Therefore, the "clearly erroneous" rule would not apply. Moore's Federal Practice, Vol 5A §52.03 [1], page 2624 (1977). Furthermore, the Court of Appeals did not disagree with the District Court's findings of facts, but rather with the District Court's application of the facts to the law. Of course, the Court of Appeals is not bound by the District Court's conclusions of law or findings that combine both fact and law, when there is an error as to the law. Moore's Federal Practice, Vol. 5A §52.03 [3], pages 2662-4 (1977).

Partida, supra. Despite the emotional argument of the petitioner, there is no need for the respondents to show prejudice, and a showing of no prejudice by the state is no defense. Peters v. Kiff, 407 U.S. 493 (1972); Hill v. Texas, 316 U.S. 400 (1942).

The powerful duties of the grand jury foreman have already been reviewed. [These duties make the grand jury foreman an extremely important person in the administration of criminal justice in the State of Tennessee and thus a person able to bring improper influence on the proceeding if he or she so desires]. Therefore, as in discrimination in the selection of the entire grand jury, the indictment in this case was properly voided. "The conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained." Hill v. Texas, supra at 406. The Court of Appeals in this case succinctly states its reasons as follows:

> It seems clear that the potential for prejudice, given the position of authority and influence the foreman or forewoman holds, is considerable, and in such cases where the fact of prejudice may be impossible to prove, yet its effect could be so insidious and far-reaching, the courts have refused to require proof of prejudice before granting relief.

Mitchell v. Rose, supra at 136.

It is not the potential for prejudice alone that mandates the correctness of the opinion below. In fact, relief has been granted by this Court to a white defendant who was indicted by a grand jury from which blacks had been improperly excluded. Peters v. Kiff, supra. This relief is mandated as a vindication for the rights of those

excluded and because the courts owe a duty to the "law as an institution" and to the integrity of the process. This reasoning is just as valid when it is the foreman of the grand jury who has been illegally selected instead of the grand jury.

II

STONE V. POWELL, 428 U.S. 465 (1976) DOES NOT AFFECT FEDERAL HABEAS CORPUS CLAIMS INVOLVING ILLEGAL DISCRIMINATORY SELECTION OF A GRAND JURY FOREMAN.

Stone v. Powell has no application whatsoever to non-Fourth Amendment claims. The holding of Stone v. Powell is that the exclusionary rule will not be applied on collateral review of Fourth Amendment claims. This case does not involve a Fourth Amendment claim. In response to the dissenters' claim that Stone would bring about a "drastic withdrawal of federal habeas corpus jurisdiction," the majority replied:

> "With all respect the hyperbole of the dissenting opinion is misdirected. Our decision today is not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right . . . and we emphasize the minimal utility of the rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding . . . In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to

> cases in which there has been both such a showing and a Fourth Amendment violation." (Emphasis added).

Stone v. Powell, 428 U.S. 465, 494 n. 37, 96 S.Ct. 3037, 3052 n. 37.

There is nothing in prior precedents of this Court that indicate that a claim involving discrimination in the selection of a grand jury foreman is not cognizable on petition for habeas corpus in federal court. See generally Brown v. Allen, 344 U.S. 443 (1953).

The State of Tennessee thought so little of the Stone v. Powell argument that in its brief to the Court of Appeals, the petitioner stated in total:

> The state respectfully submits that the district judge's citation to Stone v. Powell came at a time when the case was already decided on other grounds. The citation is surplusage and not relevant or determinative of the issues before this Court.

(R, Reply Brief for Respondent-Appellee in the Court of Appeals, page 24).

The decision of the Court of Appeals does not even mention Stone v. Powell, and it was only after the decision was rendered by the Court of Appeals on January 9, 1978, that the petitioner raised the issue of Stone v. Powell in a Petition to Rehear. (R, Petition to Rehear on Behalf of Respondent-Appellee). On March 30, 1978, the Court of Appeals refused to reconsider its decision of January 9, 1978, and in so doing, simply stated that "the court concludes that the issues raised therein [the Stone v. Powell issue] were fully considered upon the original submission and decision of this case." (R, Order of United

States Court of Appeals for the Sixth Circuit, dated March 30, 1978).

The respondent is convinced that the petitioner's view of Stone v. Powell is incorrect. However, should this Court want to consider a drastic expansion of the doctrine of Stone v. Powell beyond Fourth Amendment claims, it should not come in a case where this Court does not even have the benefit of a reasoned decision by the Court of Appeals on the issue.

III

AUTHORITIES OF THIS COURT DO NOT SUPPORT THE GRANTING OF THE PETITION OF CERTIORARI IN THIS CASE.

A. THERE IS NO CONFLICT OF DECISION.

The petitioner has shown no decision of this Court, of another Court of Appeals, or State Supreme Court to be clearly contrary to the decision of the United States Court of Appeals for the Sixth Circuit. The decision of the court below was entirely consistent with a long series of cases by this Court. See Castaneda v. Partida, supra; Peters v. Kiff, supra; Note 33 L.E.2d 783 (1973).[5]

[5] Petitioner's citation to Washington v. Davis, 426 U.S. 229 (1976) and Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977), as authority for the contention that discrimination must be proved by positive proof of intent is inappositive. This Court made clear in Washington v. Davis that statistical disparity and the shifting of the burden of proof after the showing of prima facie case was still the clear law in the area of grand jury selection. Washington v. Davis, supra at 239 and 241. Again in Arlington Heights, this Court made clear its adherence to the traditional rules for jury selection cases. Arlington Heights v. Metro. Housing Development Corp., supra at 266 n. 13. See Castaneda v. Partida, supra at 493-494.

B. THIS CASE HAS LIMITED SIGNIFICANCE BEYOND THE LITIGANTS INVOLVED.

This Court's decision in Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708 (1976), extremely limits the application of the decision of the court below. In most cases, Francis would prohibit any kind of collateral attack on a conviction by persons previously indicted and convicted in Tipton County, Tennessee, unless, like the respondents herein, they raised the issue prior to their state trial by proper motion. Francis thus eliminates the fear that this case would bring about wholesale voiding of prior convictions for persons not a party to this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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